IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC01-2620

STATE OF FLORIDA,

Appellant,

vs.

LEON ROBINSON,

Respondent.

APPELLANT'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Leon Robinson was the defendant below and will be referred to as "Appellee." The State will be referred to as "Appellant." The symbol "T" will denote the transcript. The symbol "SR" will denote the Supplemental Record on Appeal. The symbol "SR" will denote the Second Supplemental Record on Appeal. The symbol "ST" will denote the Supplemental Transcript on Appeal. All emphasis is added unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

Appellant relies on the Statement of the Case and Facts in its initial brief.

SUMMARY OF THE ARGUMENT

I

The Legislature could legitimately conclude that a very high percentage of kidnapings of children by those not the children's parents, are done for the purpose of sexually exploiting the children. The Legislature could also rationally conclude that the difficulty in confirming that an abducted child had been sexually exploited in some way or the difficulty in determining the abductor's intent even if no sexual exploitation actually occurred, justified the inclusion of all kidnapers of children under thirteen not their own.

ARGUMENT

I

THE FOURTH DISTRICT ERRED IN ITS APPLICATION OF THE RATIONAL BASIS TEST TO THE SEXUAL PREDATORS ACT.

The State agrees with the defendant that the Fourth District's opinion should be read to hold only that the statute is unconstitutional under the specific facts of this case (answer brief pp. 7-10). The District Court's discussion of the unique facts of this case and its repeated use of the term "as applied" make that clear. However, it is possible that other defendants may argue that it applies to all cases of kidnaping and false imprisonment of a child because those crimes do not contain a statutory "sexual element." See Robinson v. State, 804 So. 2d 451, 453 (Fla. 4th DCA 2001) ("Designating a person such as Robinson as sexual predator when there is not a ***sexual element*** to his crime would lead to an absurd result.").

Appellant believes the statute is constitutional as applied to Appellee. However, even if this Court were to find the statute unconstitutional as applied to the specific facts of this case, Appellant asks that this Court make clear it is not holding the statute would be unconstitutional as to all defendant's convicted under §§ 787.01 and .02.

Appellant disagrees with any suggestion in Appellee's brief that the presumption of constitutionality is not applicable to an "as applied" constitutional challenge. See, e.g., Bernard Egan & Company v. State Department of Revenue, 769 So. 2d 1060, 1061-62 (Fla. 4th DCA 2000). Appellant also disagrees that the claim raised in People v. Fuller, 324 Ill. App. 3d 728, 756 N.E. 2d 255, 258 Ill. Dec. 273 (1st. Dist. 2001), was purely a facial challenge to the statute. The defendant argued "nothing more than it is unfair for him to suffer the stigmatization of being labeled a sex offender when his crime was not sexually motivated." 756 N.E. 2d at 259.

Additionally, while the State apparently agreed that there was no "sex involved" in this case (T 4), it did not agree, nor could it possibly stipulate, that Appellee's actions were not sexually motivated (answer brief p. 18). It was reasonable for the Legislature to conclude that those who kidnap children not their own usually have a sexual motive behind their actions, regardless of whether the perpetrators have an opportunity to act on that motivation. See, e.g., Fuller, 324 Ill. App. 3d 728, 756 N.E. 2d at 260, 258 Ill. Dec. at 278 (kidnaping is often a precursor to sexual exploitation of children) and Missing, Abducted, Runaway and Thrownaway Children in America, National Incidence Study, v, xv-xvi, 153, 161, 163 (Department of Justice study showing that in 1988 as many as 4,600 children

were abducted or detained by non-family members and more than two-thirds were sexually assaulted). It was also reasonable for the Legislature to conclude that the difficulty in determining whether exploitation had occurred or whether there was a sexual motivation behind the abduction regardless of any actual exploitation, warranted the application of the sexual predator designation to all those kidnaping children under thirteen, not their own. The statute is not unconstitutional as applied to Appellee.

SECTION 775.21(4)(c) DOES NOT PROVIDE FOR AN UNCONSTITUTIONAL MANDATORY PRESUMPTION

This claim was not raised in the trial court and was not ruled upon by the Fourth District. Accordingly, it should not be addressed here.

Contrary to Appellee's claim the statute does not create a mandatory presumption. Rather, it simply provides that persons convicted of enumerated crimes are designated sexual predators. That requirement is a rule of substantive law, not an evidentiary presumption. See Ehrhardt, Florida Evidence Sec. 301.3 (2d Ed. 1984)("Although some rules of law are called conclusive presumptions from time to time, they are not properly included in a codification of the law of evidence since they are rule of substantive law in the particular area in which they exist."). As stated in Judge Stone's dissent, "The civil sexual predator statute is

plainly worded and not ambiguous. It places all who violate sections 787.01 and .02 on notice that, upon conviction, they will be classified under section 775.21." Robinson v. State, 804 So. 2d 451, 453-54 (Fla. 4th DCA 2001).

Even if the law could be construed to be a mandatory presumption, it is not unconstitutional. In Markham v. Fogg, 458 So. 2d 1122, 125 (Fla. 1984), this Court held:

> We have stated that the test to determine the constitutionality of a mandatory presumption is three-fold:
>
> > [c]onstitutionality ... under the Due Process Clause must be measured by determining (1) whether the concern of the legislature was reasonably aroused by the possibility of an abuse which it legitimately desired to avoid; (2) whether there was a reasonable basis for a conclusion that the statute would protect against its occurrence; and (3) whether the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption.
>
> Bass v. General Development Corp., 374 So.2d 479, 484 (Fla.1979). See also Gallie v. Wainwright, 362 So.2d 936 (Fla.1978).

Appellee does not seem to contest that the first two prongs of this test have been met (answer brief pp. 14-15, 17). However, he apparently takes issue with the third element, claiming entitlement to a hearing regarding whether he should be

registered as a sexual offender on the basis that he kidnaped a child under thirteen, not his own (answer brief p. 18).

The Legislature could rationally conclude that the difficulty in confirming whether an abducted child had been sexually exploited in some way, and the difficulty in determining whether the perpetrator had a sexual motive regardless of any sexual exploitation, justified the inclusion of all kidnapers of children under thirteen, not their own. Because of the child's trauma, fear, or simply because of the child's age (the victim in this case was a nineteen month old girl), the child may be unwilling or unable to communicate the fact that he or she has been sexually exploited. In fact, because of the child's age or the manner of the sexual exploitation, a child may not even be aware of the exploitation. For example, the kidnaper may secretly photograph or observe the child for sexual gratification. Additionally, the fact that a kidnaper does not succeed in sexually exploiting his victim does not mean that was not the perpetrator's intent when abducting the child.

Unfortunately, when criminals falsely imprison or kidnap children, the perpetrators do not generally take the victim to the local mall or similar place for public viewing of their actions. The nature of the crime, taking an extremely young child from her mother and out of the public view, makes it virtually impossible to

know whether the child has been sexually exploited or whether a defendant had a sexual motive for his crime, regardless of any actual exploitation. The defendant's criminal behavior created the situation. He should not be rewarded with a hearing on the matter.

Moreover, in cases where the exploitation or motive is not obvious, a hearing would likely not produce a reliable determination regarding whether there was sexual exploitation or a sexual motive behind an abduction. Should the self-serving testimony of a convicted child kidnaper suffice to rebut the presumption when that defendant's crime (taking a young child away from any other witnesses) makes it virtually impossible for the State to present any testimony to the contrary?

CONCLUSION

Based on the preceding argument and authorities, this Court should reverse.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I certify that a true copy of this document has been sent by courier to: Ian Seldin, Criminal Justice Building\6th Floor, 421 Third Street, W. Palm Beach, FL 33401, this ___ of May, 2002.

_____

Of Counsel

CERTIFICATE OF FONT

In accordance with the applicable Florida Supreme Court Administrative Order, counsel certifies that this brief had been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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Of Counsel